

Dear Les,

Thank you for the EPA technical comments ("Comments") on the 2013 Battle Mountain Remediation Feasibility Study ("FS") for the Eagle Mine Site ("Site"), dated December 10, 2014. Please understand that this letter response will not respond specifically to each comment, as we do not think it is warranted. We will explain our position further below; however, generally it appears that the third-party contractor consultant who prepared the Comments:

- 1) was not aware that the existing remedy at the site is complete and has been deemed by EPA to be "protective of human health and the environment"<sup>1</sup>;
- 2) misunderstood Battle North, LLC's ("Battle") role and the responsibilities of CBS Operations, Inc., the Potentially Responsible Party ("PRP"), at the Site, and is not aware that Battle has no responsibility for investigation or remediation of soil, surface water, or groundwater other than to the extent to which these media are disturbed by Battle's future development; and
- 3) did not review all documents pertinent to the evaluation of the FS, including the numerous Response to Comments to EPA, the Human Health Risk Assessment ("HHRA"), and prior acceptance by EPA of Work Plans and Final Reports for the Remedial Investigation ("RI") and Supplemental Investigation of the Site.

As a consequence, almost all of the Comments pertaining to further investigative activities at the Site, including the depth of soil contamination, investigation and delineation of groundwater contamination, and surface water quality are germane only to the current remedy approved by EPA and not to the further enhancement of that remedy by Battle. That said, the consultant did find several inconsistencies and typographical errors, which can easily be clarified in an addendum Letter to EPA or as part of a letter of acceptance of the FS from EPA. Please include this letter response as part of the official record for the Eagle Mine Superfund Site.

**Battle's General Response:**

First, as you know Battle is a Bona Fide Prospective Purchaser ("BFPP") of property which includes portions of the Eagle Mine Superfund Site, as defined in Section 101(40) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601(40). As such, Battle is not liable for, nor required to remediate, the existing soil and groundwater contamination at the Site. Responsibility for the existing contamination at the Site, operation and maintenance of the existing remedy, management of groundwater contamination, run-on/run-off control features, pipelines, conveyances, caps and other engineered features rests solely with the PRP, CBS Operations, Inc.

After purchasing the property in 2004, Battle approached EPA and the Colorado Department of Health and Environment ("CDPHE") to identify what "reasonable steps" were necessary, pursuant to CERCLA's BFPP liability protections, to characterize the Site contamination in

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<sup>1</sup> US EPA Fourth Five-Year Review Report for the Eagle Mine Superfund Site, September 2013.

preparation for future residential development. As EPA made clear at the onset, EPA and the state have implemented “significant remedial measures at the Site to address contamination from former mining activities.”<sup>2</sup> However, because the Property had not been “sufficiently investigated or environmentally characterized for the residential proposes” envisioned by Battle, Battle embarked on a comprehensive RI and HHRA for the Site at the direction of EPA and the state.<sup>3</sup> The RI and HHRA were conducted in conformance with work plans reviewed and approved by EPA and CDPHE. Battle then worked in collaboration with the agencies to develop a Feasibility Study to identify the additional activities that would be necessary to render the Site suitable for Battle’s residential reuse plan. The proposed activities described in the Feasibility Study are voluntary and limited solely to those necessary to bring the Site conditions to a status that allows for residential use. The consultant’s Comments fail to acknowledge the distinction between Battle as a BFPP and CBS as the PRP solely responsible for Site contamination.

Equally importantly, the consultant failed to review all the supporting documentation, numerous iterations of the Feasibility Study, and corresponding Response to Comments. In fact, the consultant is likely unaware that the December 18, 2013 Feasibility Study is incomplete without simultaneous review of all Response to Comments documents exchanged between the parties since 2011. What may not be evident from the record is that, at the request of EPA, the 2013 Feasibility Study document was not *itself* revised to address the EPA and state comments, but rather the “revisions” were acknowledged and incorporated into separate Response to Comments documents, which only taken together represent a complete Feasibility Study. It is clear that these additional resources were not reviewed by the consultant. Further, it is clear that the consultant is not familiar with the unique conditions at the Site, given the many inaccurate Comments on issues such as: water treatment requirements; annual flooding at spring runoff which transports soil amendments to the adjacent Eagle River; misapplication of the “cap” remedy selected for the Consolidated Tailings Pile (“CTP”) vs. areas of “cover” elsewhere on Site; agreed upon Institutional Controls addressing residential use; and management of the trestle in compliance with the National Historic Preservation Act ARAR vs. the PRP National Contingency Plan (“NCP”) No Action criteria, etc.

The consultant also failed to recognize that Battle is not responsible for, nor was the Feasibility Study drafted to address, NCP criteria as they apply to the entire Eagle Mine Superfund Site remedy. Battle is only responsible for the additional activities that are needed to render the Site suitable for residential use by limiting dermal exposure. The consultant failed to review Battle’s 2011 through 2013 Response to Comments, which responded to numerous EPA and state comments, additions, and deletions – and should be read holistically with the Feasibility Study. The consultant appears to be revisiting history and raising issues that have been resolved through years of discussion with EPA and the state, as memorialized in the historical Site documents. We understand the difficulty of attempting to review the 2013 Feasibility Study as a

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<sup>2</sup> Letter dated May 13, 2005 from James Stearns, Senior Attorney, Legal Enforcement Program, U.S. Environmental Protection Agency

<sup>3</sup> *Id.*

standalone document—it is nearly impossible to capture all agreements, negotiations, and issues previously resolved without a comprehensive review and understanding of the lengthy history on this Site. Consequently, the Comments do not reflect the significant progress made to date that has resulted in the agreed-upon remedy.

Lastly, and most importantly, the consultant failed to recognize that EPA's 2013 Fourth Five-Year Review of the Eagle Mine Superfund Site "concluded that the remedy for OU1 currently protects human health and the environment, because the collection and treatment of contaminated surface water and groundwater is occurring, access restrictions and capped areas are in place to prevent contact with contaminated subsurface soil, and the brown trout population is recovering."<sup>4</sup>

**Examples of Specific Inaccuracies (which include but are not limited to the following):**

Groundwater is the responsibility of the PRP not Battle. As directed by EPA and the state, Battle's remedial objectives intentionally do not include improving or maintaining groundwater quality or achieving specific groundwater standards. These ARARs would apply only to the extent that Battle's activities degraded groundwater at the Site. Previous Response to Comments from the EPA made it clear that groundwater remedy was beyond the scope of Battle's Feasibility Study, and Battle was specifically directed to remove any reference to alleged benefits to groundwater quality resulting from its activities. This glaring inaccuracy reflects that the consultant did not understand the focus of the Feasibility Study nor Battle's responsibilities at the Site.

The Comments relating to cost estimates are off-base. Battle's cost estimates are used only to compare the BFPP's remedial alternatives, and updating unit costs will not impact the resulting preferred alternatives. Battle is not seeking cost recovery from EPA or the PRP. Battle is a BFPP conducting voluntary activities at the Site at its own cost, strictly designed to allow for its planned residential development. All cost estimates should be reviewed in this light.

The Comments relating to the contaminated soil and waste left in place are misdirected at Battle. Per EPA and state directive, Battle is not required to remediate the existing soils to reduce the toxicity and volume of the contaminants of concern. The EPA has already determined that the Site conditions are protective of human health and the environment. However, if EPA agrees with the contractor's Comments, the PRP is responsible for managing the waste left on Site, not Battle. Battle's responsibility is to achieve the clean-up goals iterated in the HHRA, which the contractor did not review.

The Comments inaccurately require Battle to provide discussion and detail regarding compliance with chemical-specific ARARs for surface and groundwater quality. Per EPA and state directive, Battle is not to address surface and groundwater quality ARARs, except to the extent Battle's activities may degrade the existing surface and groundwater quality.

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<sup>4</sup> Id.

The three-foot soil cover selected in Alternatives 2 and 3 for the remediated source areas was determined by EPA and the state. The Comment directing Battle to remove this discussion is inappropriate, again due to the consultant's lack of institutional knowledge.

Mischaracterization of the application of Preliminary Remediation Goals to address "principal threats." The HHRA contains a thorough analysis of the risks posed by contaminants at the Site. EPA has determined that they are not principal threats by virtue of the fact that EPA deems the existing remedy to be complete; and to the extent these wastes require further remediation, the PRP would be responsible.

**Acknowledgements and Clarifications (which include but are not limited to the following):**

Bolts Lake is not part of the CERCLA Site, nor has it ever been identified as such by EPA or the state given that there is no evidence of contamination of Bolts Lake. Sufficient data has been collected, through the CERCLA RI and RI Addendum processes as well as through the state adjudication of the water rights associated with Bolts Lake and the extensive site and groundwater investigations, studies and analyses, to confirm that Bolts Lake is appropriately not included within the Eagle Mine Superfund site boundaries. This work was apparently not considered by the consultant in the development of its comments. Further, Bolts Lake was filled as a reservoir for approximately 100 years, continuing from the time of all mining activities through EPA's remedial activities in the vicinity; and no upgradient sources of contamination have ever been identified in the immediate Bolts Lake area. The "Highlands" area is also not included in the Eagle Mine Superfund Site, nor has it ever been identified as such by EPA or the state. Consequently, neither Bolts Lake nor the Highlands area will be included in any future Proposed Plan. Should Bolts Lake or Highlands areas be used as a borrow source in the future for soil cover or backfill, the suitability of the soils will be addressed during the Remedial Design/Remedial Action phase, as would other potential borrow sources.

The ARARs Table is out of date due to the lengthy time required to address prior FS comments and for lengthy EPA review time. EPA and the state are aware of this, and understand that a current ARARs Table will be incorporated and attached as part of the Proposed Plan. The numerical values in the ARARs table will reference the most recent standards available at that time.

Any errors or inconsistencies in Tables or Figures will be corrected and updated prior to the Proposed Plan.

Cost estimates for the Preferred Remedy can be recalculated prior to design of the Remedial Action. Changes in cost figures due to updating of unit costs over time will apply equally to all of the evaluated remedies and therefore does not affect the selection of the BFPP's preferred alternatives. Costs do not determine the selected alternatives, rather, the development plan is driving the selected voluntary alternatives. These cost estimates are used for comparison purposes only and will be used for bond purposes during Remedial Action.

Discussion regarding Institutional Controls will be updated and approved by EPA and the state prior to the Proposed Plan.

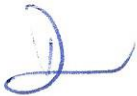
Several of the Comments, while relevant, should be addressed at the Remedial Design/Remedial Action phase pursuant to EPA and state directive (for example, replacement of the soil cover and CTP cap, selection of excavating and transport equipment, method for demolishing the trestle, etc.).

### **Conclusion**

The December 10, 2014 Comments from EPA applied the incorrect standard of analysis for evaluating the compliance of the FS with the NCP regulations, and inappropriately considered Battle as a PRP proposing to implement a remedy at an incomplete CERCLA site. The existing remedy at the Site has been deemed complete by EPA, and Battle is a BFPP implementing further enhancements to the existing remedy. The additional remedial measures are proposed only to enable residential development in accordance with the standards set forth in the HHRA (as accepted by the State and EPA) and are complimentary of and consistent with the remedy implemented by the PRP.

Please note that Battle solicited input and comments from the Town of Minturn in preparing this letter response, which are incorporated herein. Battle appreciates the opportunity to continue discussions with EPA to move toward a Proposed Plan. Please feel free to contact us with any questions you may have.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Dave Kleinkopf', with a stylized flourish at the end.

Dave Kleinkopf

Battle North, LLC